



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 1081 OF 2015

LORIAK PROPERTIES LIMITED.....PLAINTIFF

VERSUS

SUSAN WANJIRU GITAU

PETER KIMANI GITAU

JOSEPH KIMANI GITAU

(Sued as the administrators of the estate

of the late Gitau Kio).....DEFENDANTS

RULING

The plaintiff brought this suit against the defendants on 30th October 2015 seeking an order to compel the defendants to complete the sale and transfer of a parcel of land known as L.R No. 209/2490/49 (hereinafter “the suit property”) in favour of the plaintiff and in default, the Deputy Registrar to execute all the necessary documents on behalf of the defendants to enable the said property to be transferred to the plaintiff. In its plaint dated 27th October 2015, the plaintiff averred that on 6th August 2008, it entered into an agreement with the late Gitau Kio (hereinafter referred to only as “the deceased”) for the sale of the suit property at a price of Kshs 10,000,000/-. The plaintiff averred that before the completion of the sale agreement, the deceased died in July 2010. The plaintiff averred that following the death of the deceased, the defendants were appointed as administrators of his estate in Nakuru Succession Cause No. 657 of 2011. The plaintiff averred that the defendants failed to inform the court in the said succession cause of the existence of the sale agreement that the plaintiff had entered into with the deceased consequent to which the suit property was listed as part of the deceased’s assets available for distribution among the beneficiaries of the deceased’s estate.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 27th October 2015 in which the plaintiff sought a temporary injunction restraining the defendants from distributing, transmitting, transferring, alienating or in any way dealing or interfering with the suit property pending the hearing and determination of this suit. The application was supported by an affidavit sworn by the plaintiff’s director, John K. Rotich on 26th October 2015. In the affidavit, the plaintiff reiterated that it had entered into an agreement for sale with the deceased in respect of the suit property on 6th August 2008 which bound the deceased and his personal representatives. The plaintiff averred that it was instrumental in procuring the extension of the lease for the suit property which had expired. The plaintiff averred that it spent substantial amount of money in obtaining the necessary approvals and in clearing the outstanding land rent and rates before a new Grant for the suit property was issued in favor of the

deceased on 27th November 2013. The plaintiff averred that the defendants' non-disclosure of material facts in Nakuru Succession Cause No. 657 of 2011 led the court to believe that the suit property was available for distribution amongst the beneficiaries of the deceased's estate.

The plaintiff averred that following the issuance to the defendants of a Grant of Letters of Administration in respect of the estate of the deceased in the said succession cause, the defendants had commenced the process of distributing the deceased's assets amongst his heirs without regard to the said agreement for sale which the plaintiff had entered into with the deceased in respect of the suit property. The plaintiff averred that it was willing, ready and able to complete the sale transaction between it and the deceased and that unless the orders sought were granted, it would suffer irreparable injury because the defendants would proceed to distribute the suit property to the beneficiaries of the estate of the deceased thereby putting the property beyond its reach.

The application was opposed by the defendants through a Notice of Preliminary Objection dated 24th November 2015 and a replying affidavit sworn by the 2nd defendant on 17th February 2016. In the Notice of preliminary objection, the defendants stated that the application and entire suit were brought in contravention of Order 4 Rule 1(4) of the Civil Procedure Rules. The defendants contended further that the sale agreement dated 6th August 2008 (hereinafter referred to as "the agreement for sale") which is the foundation of the plaintiff's claim herein was tainted with illegality and as such unenforceable. The defendants contended that the said agreement was null and void for want of consent of the Commissioner of Lands. The defendants contended further that the said agreement was void for uncertainty and that the plaintiff's application and entire suit were time barred under section 4(1) of the Limitation of Actions Act. The defendants contended further that the application was misconceived since the allegations therein were in contravention of section 55 of the Law of Succession Act, Chapter 160 Laws of Kenya.

In their replying affidavit, the defendants averred that they were strangers to the said agreement for sale which in any event stood rescinded at the expiry of the time within which it was to be enforced. The defendants contended that the said agreement was void for mistake as to the existence of the subject matter since the lease in respect of the suit property had expired. The defendants reiterated that the application and entire suit were time barred and that the consent of the Commissioner of Lands had not been sought as required by the law thereby rendering the agreement illegal and unenforceable.

The defendants contended that they were unaware of the said agreement for sale and as such were under no obligation to disclose the same in the Succession Cause aforesaid. The defendants averred that the plaintiff had not demonstrated a prima facie case for specific performance as it had not shown that it had performed all the terms of the agreement for sale. The defendants averred further that the plaintiff had not demonstrated that he would suffer irreparable hardship to warrant the grant of an order of specific performance or injunction. The defendants contended that an award of damages would be an adequate remedy for the plaintiff. The defendants denied the plaintiff's assertion that it had facilitated the extension of the lease in respect of the suit property. The defendants contended further that the Grant of Letters of Administration in respect of the estate of the deceased had not been confirmed to pave way for the distribution of the assets of the deceased and as such the plaintiff was at liberty to object to the inclusion of the suit property in the Succession Cause. The defendants contended that this court had no jurisdiction to deal with disputes concerning properties the subject of succession proceedings. The defendants contended further that the agreement for sale was not properly executed and/or attested and that the same was not sealed and stamped rendering the same unenforceable.

Submissions by the parties:

The application was argued by way of written submissions. The plaintiff filed its submissions dated 3rd August 2016 on 5th August 2016. The plaintiff submitted that it had met the conditions for grant of a temporary injunction. In support of this submission, the plaintiff cited the cases of Giella vs. Cassman Brown (1973) EA358 and Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125. The plaintiff submitted that it had demonstrated a genuine and arguable case and that the performance of its obligations under the agreement for sale was not disputed. The plaintiff submitted that

it had established that any other relief would be inadequate and that it would suffer irreparable injury which cannot be compensated by damages. The plaintiff urged the court to exercise its discretion in its favour.

On their part, the defendants filed their submissions on 29th September 2016. The defendants submitted that specific performance is an equitable remedy which is not granted as a matter of course. The defendants cited Chitty on Contracts, 30th Edition Volume 1 in support of their submission that the jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and that the relief will not be granted if the contract suffers from some defect, such as a failure to comply with formal requirements, mistake or illegalities which make the contract invalid or unenforceable.

The defendants reiterated that the plaintiff's suit and application were time barred under section 4(1) of the Limitation of Actions Act. The defendants argued that a period of 8 years had lapsed between the date of the sale agreement and the date when this suit was filed. The defendants submitted further that the agreement for sale provided for 90 days completion period which lapsed in October 2008 before the death of the deceased. The defendants cited the case of Richard Toroitich vs. Mike K. Lelmet & 3 others (2014) eKLR in support of their submission that an action based on contract cannot be brought six years after the date of the accrual of the cause of action. The defendants submitted that since the contract period had expired, there was no contract in existence capable of being enforced or protected by an injunction. They argued that the agreement for sale was void and incapable of performance having expired by effluxion of time. The court was referred to the case of National bank of Kenya Ltd vs. Pipeplastic Samkolit(K)Ltd & another(2002)EA 503 in support of the defendants' submission that a court cannot rewrite a contract for the parties and that unless coercion, fraud or undue influence are pleaded and proved, parties are bound by the terms of their contract.

The defendants submitted further that under clause 6 of the title (Grant) which was issued to the deceased, the deceased was not permitted to sell, transfer, sublet charge or part with possession of the suit property without prior written consent of the Commissioner of Lands. The defendants submitted that it was not in dispute that by the time of entering into the agreement for sale with the plaintiff, the deceased had not obtained the Commissioner of Lands' consent and therefore the sale agreement was null and void. The defendants cited the case of Charles Mwirigi Kiriti vs. Thananga Tea Growers Sacco Ltd & another (2014)eKLR in support of the submission that the order of specific performance is based on the existence of a valid and enforceable contract and that since the agreement for sale herein was tainted with illegality and was thus unenforceable, the relief of specific performance sought by the plaintiff could not be granted.

The defendants submitted further that the plaintiff's application for injunction was incompetent because it was not properly anchored on the plaint which has no prayer for injunction. For this submission, the defendant relied on the cases of Morris & Co. Ltd vs. Kenya Commercial Bank Ltd & others(2003)2EA 605, Joseph Onchweri Obegi vs. Gesare Okioma(2012)eKLR and Ngorika Farmers Cooperative Society Ltd vs. John Kiarie & 2 others(2006)eKLR where it was held that where there is no prayer for injunction in the plaint, an injunctive order sought in an application cannot issue.

The defendants submitted further that since the plaintiff had admitted that it had not paid the full purchase price and it was not offering any, the remedy of specific performance was not available to the plaintiff. The defendants argued that the plaintiff had not shown that it attempted to pay them or the deceased the balance of the purchase price. The defendants referred to the case of Gurdev Singh Birdi & another vs. Abubakar Madhbuti CA No. 165 of 1996 in support of the submission that specific performance will not be granted unless a plaintiff proves that it is ready, able and willing to carry out its part of the contract. The defendants submitted that the plaintiff had not tendered any evidence to show that it had funds to complete the payment of the balance of the purchase price. The defendants cited the case of Nabro Properties Ltd vs. Sky Structures ltd & 2 others (2002)2KLR 300 in support of their submission that the mere statement by the plaintiff that it was ready and willing to pay the balance of the purchase price was not enough to discharge the burden that was upon it.

On the issue of this court's jurisdiction to entertain the application, the defendants submitted that the

application as couched was intended to bar the High Court at Nakuru from dealing with the suit property in Succession Cause No. 657 of 2011. The defendants argued that the court was being invited to impede and flout the succession proceedings and the Grant of Letters of Administration issued therein. The defendants submitted that this court being of equal and concurrent jurisdiction with the High Court cannot challenge the decision of the High Court. The defendants submitted that the application herein could only be entertained in the said Succession Cause under section 93(2) of the Law of Succession Act and that this court lacked jurisdiction to determine whether the suit property should be included in the assets of the deceased in the said succession proceedings.

The defendants submitted that the plaintiff had not established a prima facie case and had also not demonstrated that it would suffer irreparable loss that cannot be compensated by an award of damages since the amount involved was known. The defendants referred to the case of Purple Rose Trading Company Ltd vs. Bhanoo Shashinkant Jai (2014) eKLR in support of their submission that being an equitable remedy, specific performance will not be granted where damages would afford the injured party adequate protection.

The defendants submitted further that the balance of convenience was in favour of the deceased's estate which stood to suffer greater harm if the injunction was granted. Reliance was placed on the case of American Cyanamid Co. vs. Ethicon Ltd (1975)1All ER 504 in support of this submission. The defendants submitted that the plaintiff had no prospect of obtaining a permanent injunction at the trial since none had been sought. The defendants contended that they were in possession of the suit property which was still registered in the deceased's name. Further, that the value of the suit property had more than tripled since the agreement for sale was executed and as such the balance of convenience was in favour of refusing the injunction.

Determination of the issues raised by the parties:

What is before me is an application for a temporary injunction. The principles upon which this court exercises its discretion in applications of this nature are now well settled. In the case of Giella vs. Cassman Brown and Co. Ltd. (supra) which was cited by both parties in support of their respective submissions, it was held that an applicant for a temporary injunction must establish:-

- (i) A prima facie case with a probability of success
- (ii) That if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages and;
- (iii) If in doubt, the court shall determine the application on a balance of convenience.

In the of Mrao Limited vs. First American Bank Limited & 2 Others (supra), the court defined a prima facie case as;

“a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR, the court stated that;-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

The court went further to state that;

“.....in considering whether or not a prima facie case has been established, the court does not

hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”

On the material before me, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendants and that unless the injunction sought is granted, it will suffer irreparable injury which cannot be compensated by an award of damages. The plaintiff has established that it entered into an agreement for sale with the deceased in respect of the suit property. The plaintiff has also established that it performed part of its obligations under the said agreement for sale and that the agreement could not be completed due to the death of the deceased. A copy of the said agreement for sale which was annexed to the affidavit in support of the plaintiff's application shows that the said agreement bound the deceased and his legal representatives. The plaintiff has stated that it is ready, willing, and able to complete the agreement. The plaintiff has demonstrated that the defendants have refused to complete the said agreement for sale. On the harm the plaintiff is likely to suffer, it is not disputed that the suit property is listed as one of the assets of the deceased in Nakuru Succession Cause No. 657 of 2011 and that the defendants have been issued with Grant of Letters of Administration in respect of the estate of the deceased. The said Grant of Letters of Administration which was issued on 26th February 2015 may be confirmed at any time paving the way for the defendants to distribute the assets of the deceased including the suit property to the beneficiaries of the deceased's estate. I am in agreement with the plaintiff that if the defendants proceed with the distribution of the suit property amongst the beneficiaries of the estate of the deceased as aforesaid, the said property would be put beyond its reach if it succeeds at the trial. I am not persuaded in the circumstances of this case that damages would be an adequate remedy for the plaintiff.

The defendants have contended that the said agreement for sale is unenforceable for several reasons which I have highlighted above. I am of the opinion that the issues raised by the defendants in opposition to the application cannot be determined on affidavit evidence. If I was to attempt to determine the same, I would risk conducting a mini trial at this stage thereby stepping on the mandate of the trial court. The issues as to whether or not the agreement for sale had lapsed by effluxion of time, whether the suit is time barred and whether the plaintiff is ready, willing, and able to pay the balance of the purchase price cannot be determined on the affidavit evidence before the court. The same applies to the other issues raised by the defendants such as whether or not the said agreement for sale is null and void on account of mistake, uncertainty and want of consent of the Commissioner of Lands.

My preliminary findings on some of these issues do not support the position taken by the defendants. I am not persuaded that the sale agreement which the plaintiff had entered into with the deceased expired by effluxion of time or that the suit is time barred. There is no material before this court in support these contentions. It is true that the agreement for sale was to be completed within 90 days. There was however a provision for extension of this limited period. Whether or not that period was extended is a matter which can only be determined at the trial. The same applies to the defendants' contention that this suit is time barred. Whether or not the suit is time barred would depend on the determination on when the cause of action accrued. Again, the issue cannot be determined of the affidavit evidence before the court. I am also not convinced that the said agreement for sale is null and void for lack of consent of the Commissioner of Lands. I am in agreement with the defendants that it was a special condition of the Grant No. IR 151007 that the deceased would not sell the suit property without the consent of the Commissioner of Lands. This however did not bar the deceased from entering into an agreement for sale of the suit property subject to such consent being obtained which is what the deceased did herein. In any event, Clause 6.3.4 of the agreement for sale placed the obligation to obtain consent to transfer the suit property upon the deceased. In my view, failure or refusal by the defendants to obtain the said consent does not render the said agreement null and void.

A part from the substantive issues which I have mentioned above, the defendants had also raised technical issues against the plaintiff's application for injunction. The first issue raised by the defendants was that since the plaintiff had not sought an injunction in the plaint, an order for temporary injunction was not available to it. The plaintiff's application was brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules. These rules empower the court to grant the temporary injunction sought by the plaintiff

pending the hearing and determination of the suit herein. I am of the view that in the circumstances of this case, it was not mandatory for the plaintiff to seek a permanent injunction in the plaint to be entitled to the temporary injunction sought. In the circumstances, I find not merit in the defendant's argument that the application herein is incompetent.

The other argument that was put forward by the defendants was that this court has no jurisdiction to determine the suit herein. The defendants contended that the plaintiff should have lodged its claim in the Nakuru High Court Succession Cause No. 657 of 2011. The issue before the High Court in Nakuru concerns the succession of the estate of the deceased. What is before this court is a dispute over the agreement for sale which the deceased is said to have entered into with the plaintiff in relation to one of its properties which is the subject of the succession proceedings. I am of the view that a dispute of this nature can either be determined in the succession proceedings or in a separate suit like the one before me. This view finds support in the decision of Gikonyo J. in the case of Simon Kamundi vs. Tabitha Gatiria Maingi & 3 others Meru Succession Cause No.432 of 2010, where he stated as follows;

“Second, I do not think there is an absolute prohibition in law that a purchaser of the estate property can never be a party in a succession proceedings relating to the estate of which property he purchased. I have had occasion to deal with this subject in the case of Meru HC Succession Cause No. 499 of 2010 Mecklina Kirigo M'murithiu vs. Mary Gantukusi Mukiri and 2 others [2016] e KLR and the court stated thus:-

The law on this subject is not clear. Some courts have held that a purchaser's claim should be litigated separate from the succession cause, whilst other have said it should be within the succession cause. The decision of the Court of Appeal in the case of Rubo Kipngetich Arap Cheruiyot vs. Peter Kiprof Rotich Civil Appeal No. 128 of 2008 also invites diverse interpretation; when it stated as follows:-

“Claims by third parties to deceased persons ‘properties although sometimes lodged in the succession cause of the deceased person are better litigated in separate suits’”. [underlining mine for emphasis]

....The Court of Appeal recognized these possibilities in the case of Rubo Kipngetich Arap Cheruiyot vs. Peter Kiprof Rotich Civil Appeal No. 128 of 2008(supra). Therefore, I take the view that there is no absolute prohibition of third party claims being litigated in a succession cause except this should be decided on case to case basis depending on the circumstances of each case.”

Due to the foregoing, it is my finding at this stage that the plaintiff's suit is properly before the court and the court has jurisdiction to determine the same.

In the final analysis, I am satisfied that that the plaintiff has met the conditions for granting a temporary injunction. The plaintiff's application dated 27th October 2015 is allowed in terms of prayer 3 thereof. The plaintiff shall have the costs of the application.

Delivered and Signed at Nairobi this 28th day of April, 2017

S. OKONG'O

JUDGE

In the Presence of

Mr. Wachira h/b for Ruto for the Plaintiff

Mr. Mirie for the Defendants

Kajuju Court Assistant